No. 2717

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. W. KEYES, Trustee of the Estate of CHEHALIS RIVER LUMBER & SHINGLE COMPANY, Bankrupt, *Appellant.*

vs.

W. C. DAVIE, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEE

VAN M. DOWD,
Attorney for Appellee.

1003 Fidelity Building, Tacoma, Wash.

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ARGUMENT.

The facts in the case have been well stated in appellant's brief. There now arises the question whether the appellee is entitled to a lien as general manager of a lumber company under and by virtue of the statutes of the State of Washington.

Washington lien laws are very broad in their wording, providing that "*every* person performing *labor* * * * * in the *operation* of a lumber company," etc. In many other states the laws provide for liens to be given to "laborers and operatives" or to those doing "manual and mechanical labor;" and attention is called thereto for the reason that courts in the latter states have necessarily given stricter interpretations to the statutes than should be given in this case.

The Washington State Supreme Court, in *Graham* v. *Gardner*, 45 Wash. 648, at the bottom of page 651, says, in interpreting one of the Washington lien statutes similar to the one in question:

> "Our view is that the sole intention of the legislature was to provide a lien for all employees in and about the mill directly performing labor in its operation. In other words, to include persons who, in the ordinary acceptation of the term, could be construed as mill employees."

The word "employee" in the ordinary acceptation of the term is, indeed, much broader than laborer or operative, the chief distinction being that employees include those using both manual and mental effort, while laborer or operative generally refer to manual effort only. In the case of *In re Lawler*, 110 Fed. 135, on page 137, Judge Hanford says:

> "The word employee is of broad significance

> including any person who gives his time for hire. It is my opinion that the title of this statute was not chosen in a careless manner, but with a deliberate purpose to aid in giving the enactment a true interpretation in accordance with the intention of the legislature to insure to the employees of the corporation in this state payment of their wages by subjecting the entire assets and franchise of every industrial corporation to a prior lien in favor of employees. * * * The statute does not in terms restrict its beneficence to persons performing labor in the operation of railways, canals, sawmills and factories, but is much more comprehensive. The lien is given to every person performing labor in the operation of any railway, * * * sawmill, lumber or timber company. Therefore, *all* participants, in carrying on the *operation* of the several kinds of companies mentioned are entitled to liens."

In conclusion, Judge Hanford says that the claimant was aiding in carrying on the operation of a lumbering company and is therefore entitled to a lien for his wages.

If the claimant therein was entitled, surely Davie, the appellee herein, was aiding in carrying on the operation of a lumber company and the law applies to him. Davie, as manager, likewise made sales of lumber, besides performing other duties attendant upon the general management. Record, p. 8.

In the case of *Cors & Wegener* v. *Ballard Iron Works*, 41 Wash. 380, 82 Pac. 713, three stockholders, *working in the employ of said company,*

one as manager and one as foreman of the foundry, were allowed their wages as preferred claims in a receivership proceeding. The only words designating the occupations show that William Darville, as acting manager, was to receive $100 per month. In appellant's brief attention is called to the use of the word wages as signifying that the work was probably manual in its character; but the word salaries is also used, and nowhere in the case is it shown that the three claimants were working in capacities other than manager and foreman of the foundry.

In the case of *Gould* v. *McCormick,* 75 Wash. 61, plaintiff was allowed a lien for work in the preparation of plans for a building and, in addition, for the superindendence of the construction of the building.

In *Vincent* v. *Snoqualmie Mill Co.*, 7 Wash. 566, the court allowed plaintiff's lien for labor performed *upon and about the mill.*

From the above decisions the underlying principle of Washington lien statutes seems to be the benefit derived from the work of the lien-claimant; and where an employee performs labor, in the operation of a sawmill, that results in a direct benefit to the mill, that employee is entitled to a labor lien. Indeed, the value of the property turned over to the trustee was directly affected by the labor of

appellee. Through his work, in soliciting orders, the trustee has obtained the accounts receivable. Manifestly, the manager of a mill performs labor in the operation of it as clearly as does the engineer who controls the machinery, the carrier who operates the carriage upon which the logs are taken to the saw, or as the man who wheels away the sawdust.

A manager of a mill was held to be an employee so that he might have a lien for his salary; as was likewise a foreman of a mill.

Conlee Lbr. Co. v. *Ripon Lbr. & Mfg. Co.*, 29 N. W. 285.

The case last cited is on all fours with appellee's case, and the court held that being an active business man, who devoted his whole time to the business, taking charge of selling lumber and of measuring and piling it, made him an emlpoyee under the statute; and the fact that he was a stockholder did not weigh against him.

One who acts as an overseer and assistant superintendent in the repair of a mill is entitled to a lien.

Willamette F. & M. Co., v. *Remick*, 1 Or. 169.

Performing work as an architect and as a superintendent is "performing labor" of such character as to entitle one to a lien.

Taylor v. Gildsdorff, 74 Ill. 354.

In the case of *Wetzel & T. Ry. Co.* v. *Tennis Bros. Co.*, 145 Fed. 458, the Court was called on to interpret a statute of West Virginia, which reads: "Every workman, laborer or other person, who shall do or perform any work or labor," etc. The judge's decision runs, in part, as follows (page 463):

> "To supervise the construction of a street car line, as well individually as by and through assistants, is to *perform work and labor* and the person so rendering the same is entitled to the benefits of the mechanics' lien law of West Virginia."

The first and most common meaning of the word "labor," as given in Funk & Wagnall's New Standard Dictionary, is "Physical or mental effort, particularly for some useful or desired end." In the same authority the word "operation" is defined as "The act or process of operating," and also "the exertion or action of any form of power or energy, physsical, mechanical, mental or moral." The word "operate" means "to conduct or manage the affairs of; superintend; as to operate a railroad."

Any objection that appellant might raise that appellee was a stockholder and officer of the company and, therefore, barred from obtaining a lien, is disposed of in *In re Swain Co.*, 194 Fed. 749, wherein Judge DeHaven held that officers may become the creditors of a corporation and as individ-

uals may contract to perform clerical or manual labor.

Appellant, in attempting to ascertain the intention of legislatures and the purposes of lien statutes, has cited the case of *Coffin* v. *Reynolds*, 37 N. Y. 640, and has quoted freely to the effect that the real purpose was to protect laborers doing manual work. However, it will be noticed that the statute construed in that case was *not* a mechanics' lien statute but one making stockholders of corporations liable for debts of the corporation to laborers or servants. The purposes of the two statutes are discussed and distinguished in *Stryker* v. *Cassidy*, 76 N. Y. 50, in which it was held that the language (of a statute similar to the Washington statute) makes no distinction between skilled and unskilled labor or between mere manual labor and the labor of one who supervises, directs and applies the labor of others.

The next case cited is *People* v. *Remington*, 52 N. Y. 329, and later *Re Directors Am. Lace & F. P. Co.*, 51 N. Y. Supp. 818. The New York statute is different from the Washington statute in three essentials.

The New York statute uses the term "employees, laborers and operatives," and also the word "wages" wherever the amount due is referred to, and it excludes insurance corporations. The New York courts have held that the word "employees," taken

with the other two words, means *manual* laborers; and it is not used in the broad, ordinary sense of the word. The word "wages" was considered significant, as generally it is applied to manual laborers, while the exclusion of insurance corporations, where no actual manual labor is performed, only strengthened the court's opinion that the purpose of the statute was to protect manual laborers only. The Washington statute uses the terms "*every* person performing labor," and "moneys due," and it excludes *no* class of business. *In re Stryker*, 53 N. E. 525.

The reference to *Richardson* v. *Langston & Crane*, 68 Ga. 658, is not in point, as the word "laborer" is *nowhere* used in the Washington statutes; and the same argument applies to *Pa. & Del. R. R. v. Leuffer*, 84 Pa. St. 168.

Since appellee's claim is based on the wording of Section 1149, Rem. and Bal. Codes of Washington, and on Section 64 B (5), all authorities under Section 54 B (4) are consequently not in point. Nor should the cases of *In re Carolina Cooperage Co.*, 96 Fed. 950 and the three following, be considered.

The National Bankruptcy act has enumerated four classes of labor which are entitled to priority, while the Washington State Statute has included *every person performing labor;* and it is not fair to say that, because Congress intended to include

but four, the State Legislature likewise intended to include but four.

It was clearly the intention of the New York legislature to *exclude* insurance clerks from the benefit of the statute, as shown in *In re Stryker*, *supra*, but the same construction cannot be placed on the Washington statute.

From the authorities heretofore cited, it is clear that the Washington statute intended to include not only manual laborers but "every person" who devotes all of his time and effort to a given business and who actually helps in the production of the goods manufactured; and the mere fact that appellee earned a little more than the foreman or the plainer or the engineer, should not exclude him from the classification of "every person performing labor"—especially when his work was more essential to the operation of the mill than was that of any of the other men aforementioned. The salary had been fixed for general manager before he assumed those duties; he merely stepped into another man's place. His work consisted of soliciting orders, collecting money, selecting and buying timber and of general supervision of the mill and of the logging camp. If anyone performed labor, surely Davie did.

Referring to the first assignment of error, that the State statutes, under which appellee claims priority, have been supplanted by the provisions of

the National Bankruptcy act, it is to be noted that this point has been raised for the *first time* in the Circuit Court of Appeals. Neither in the District Court nor before the Referee in Bankruptcy was this question considered; and appellee submits that this Court cannot now consider it.

Lane & Co., v. *Maple Cotton Mills*, 226 Fed. 692.

Pine River Logging & Imp. Co. v. *U. S.*, 46 L. Ed. 1164, 186 U. S. 279.

But in order to protect the interests of appellee, should this Court decide that the question raised is pertinent, a short discussion will be made on it.

The trend of statutes and decisions has been toward greater liberality inthe matter of exemptions and priorities for labor claims. The language of the Bankruptcy Act is not that there shall be no such priorities allowed, except as provided in Section 64 B (4); on the contrary, it is positive in granting in all cases a certain priority. Congress may have thought that in some states labor lien laws did not include certain classes enumerated in Section 64 B (4); in fact, traveling salesman in some states can not obtain liens. In such cases Section 64 B (4) would control—the language being positive. But when, as here, the state law is more liberal than is the provision made in that section and when it includes all those classes *and more*, then it follows that the State law should apply and that

full effect should be given to all the language of the act.

In the cases of *In re Rouse, Hazard & Co.*, 91 Fed. 96, the question arose as to whether those classes enumerated in Section 64 B (4) should be governed by the provision therein, as to time and the amount earned, when the State statute was broader; and the court held that Section 64 B (4) alone would apply.

But the question of this section controlling when a labor-claimant, not included in its classification, wishes to obtain a priority under Section 64 B (5), has not been passed on, except in *In re Crown Point Brush Co.*, (D. C. N. Y.) 200 Fed. 882.

From the decision of this court in *In re Amoratis*, 178 Fed. 919, it would seem that appellee has a standing under the Bankruptcy Act.

It is respectfully submitted, therefore, that the order of the court below should be affirmed.

VAN M. DOWD,
Attorney for Appellee.